

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7 WILLIAM R. POINDEXTER,)
8 Plaintiff,) No. CV-10-0351-CI
9 v.) ORDER DENYING PLAINTIFF'S
10 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
11 of Social Security,) AND GRANTING DEFENDANT'S
12 Defendant.) MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (ECF No. 12, 17.) Attorney Lora Lee Stover represents William Poindexter (Plaintiff); Special Assistant United States Attorney Terrye Shea represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

23 Plaintiff protectively filed for Supplemental Security Income
24 (SSI) on March 20, 2008. He alleged disability due to problems with
25 a blood clot and his right calf, anemia, depression, anti-social
26 problems, and a concussion, with an onset date of December 1, 2007.
27 (Tr. 183.) His claim was denied initially and on reconsideration.
28 Plaintiff requested a hearing before an administrative law judge

1 (ALJ), which was held on October 27, 2009, before ALJ Marie
 2 Palachuk. (Tr. 47-84.) Plaintiff, who was represented by counsel,
 3 and vocational expert Robert Aslan (VE) also testified. *Id.* The ALJ
 4 denied benefits on November 6, 2009, and the Appeals Council denied
 5 review. (Tr. 25-38, 1-5.) The instant matter is before this court
 6 pursuant to 42 U.S.C. § 405(g).

STANDARD OF REVIEW

8 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 9 court set out the standard of review:

10 The decision of the Commissioner may be reversed only
 11 if it is not supported by substantial evidence or if it is
 12 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
 13 1097 (9th Cir. 1999). Substantial evidence is defined as
 14 being more than a mere scintilla, but less than a
 15 preponderance. *Id.* at 1098. Put another way, substantial
 16 evidence is such relevant evidence as a reasonable mind
 17 might accept as adequate to support a conclusion.
Richardson v. Perales, 402 U.S. 389, 401 (1971). If the
 18 evidence is susceptible to more than one rational
 19 interpretation, the court may not substitute its judgment
 20 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
Morgan v. Commissioner of Social Sec. Admin. 169 F.3d 595,
 21 599 (9th Cir. 1999).

22 The ALJ is responsible for determining credibility,
 23 resolving conflicts in medical testimony, and resolving
 24 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 25 Cir. 1995). The ALJ's determinations of law are reviewed
 26 *de novo*, although deference is owed to a reasonable
 27 construction of the applicable statutes. *McNatt v. Apfel*,
 28 201 F.3d 1084, 1087 (9th Cir. 2000).

22 It is the role of the trier of fact, not this court, to resolve
 23 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 24 supports more than one rational interpretation, the court may not
 25 substitute its judgment for that of the Commissioner. *Tackett*, 180
 26 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
 27 Nevertheless, a decision supported by substantial evidence will
 28

1 still be set aside if the proper legal standards were not applied in
2 weighing the evidence and making the decision. *Brawner v. Secretary*
3 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
4 there is substantial evidence to support the administrative
5 findings, or if there is conflicting evidence that will support a
6 finding of either disability or non-disability, the finding of the
7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
8 1230 (9th Cir. 1987).

9 **SEQUENTIAL EVALUATION PROCESS**

10 The Commissioner has established a five-step sequential
11 evaluation process for determining whether a person is disabled. 20
12 C.F.R. §§ 404.1520(a), 416.920(a); *see Bowen v. Yuckert*, 482 U.S.
13 137, 140-42 (1987). In steps one through four, the burden of proof
14 rests upon the claimant to establish a *prima facie* case of
15 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
16 920, 921 (9th Cir. 1971). This burden is met once a claimant
17 establishes that a medically determinable physical or mental
18 impairment prevents him from engaging in his previous occupation.
19 C.F.R. §§ 404.1520(a), 416.920(a). "This requires the
20 presentation of 'complete and detailed objective medical reports of
21 his condition from licensed medical professionals.'" *Meanel v.*
22 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (citation omitted).

23 If a claimant cannot do his past relevant work, the ALJ
24 proceeds to step five, and the burden shifts to the Commissioner to
25 show that (1) the claimant can make an adjustment to other work; and
26 (2) specific jobs exist in the national economy which claimant can
27 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*
28

1 *Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

2 **STATEMENT OF THE CASE**

3 The facts of the case are set forth in detail in the transcript
 4 of proceedings and are briefly summarized here. Plaintiff was 37
 5 years old on the alleged onset date. (Tr. 36.) He testified he was
 6 unmarried and lived alone in an apartment. (Tr. 63.) He reported
 7 attending school through the ninth grade, at which time he dropped
 8 out due to incarcerations. He testified he attended special
 9 education in elementary and middle school. (Tr. 53, 237-38.)
 10 Plaintiff testified he had taken three adult level tests towards
 11 obtaining a high-school equivalency diploma. (Tr. 52.) Plaintiff
 12 reported past work experience as a moving van worker, a laborer, and
 13 roofing and drywall worker. (Tr. 184,.) He also had experience in
 14 fiberglass laminating. (Tr. 76.)

15 **ADMINISTRATIVE DECISION**

16 At step one of the sequential evaluation process, the ALJ found
 17 Plaintiff had not engaged in substantial gainful activity since
 18 April 24, 2007, the application date.¹ (Tr. 27.) At step two, she
 19 found Plaintiff had severe impairments of "peripheral arterial
 20 disease/deep vein thrombosis, ulcerative colitis, possible Crohn's
 21 disease, borderline intellectual function." (*Id.*) She found the
 22 following conditions did not cause more than a minimal limitation in
 23 Plaintiff's ability to work and, thus, were non-severe: depression,
 24

25 ¹ Under the Social Security regulations, if a claimant meets
 26 requirements for eligibility, SSI benefits are not payable until the
 27 month following the month the application was filed. 20 C.F.R.
 28 § 416.335.

1 anti-social disorder and polysubstance abuse in reported remission.
2 (Tr. 28.) At step three, the ALJ made detail findings and concluded
3 Plaintiff's impairments or combination of impairments did not meet
4 or equal an impairment listed in 20 C.F.R. Part 404, Subpart P,
5 Appendix 1 (Listings). (Tr. 28-31.) Specifically, she considered
6 Listing 4.12 (Peripheral Arterial Disease); Listing 5.06
7 (Inflammatory Bowel Disease); Listing 12.05 (Mental Retardation);
8 Listing 12.08 (Personality Disorder) and Listing 12.09 (Substance
9 Addiction). (Tr. 29-31.)

10 At step four, the ALJ determined Plaintiff had the residual
11 functional capacity (RFC) for light level work activities with the
12 following physical and mental non-exertional limitations:

13 [H]e has the unlimited ability to push and pull, can only
14 occasionally climb ladders, ropes and scaffolds and must
15 avoid even moderate exposure to hazards, such as
16 unprotected heights and machinery. He is able to learn
17 and perform simple work related tasks although his
concentration, persistence and pace may be slowed on more
complex tasks due to the need for extra instruction. The
claimant is also able to interact with coworkers and the
general public on a superficial level, but is able to
adapt to only routine changes in the work setting.
18

19 (Tr. 32.) In discussing the RFC determination, the ALJ found
20 Plaintiff's subjective complaints were not entirely credible. (Tr.
21 32-34.) Based on the RFC assessed and the VE's testimony, the ALJ
22 found Plaintiff could no longer perform his past relevant work.
23 (Tr. 19.) Proceeding to step five, she found there were other jobs
24 in significant numbers Plaintiff could perform. The ALJ concluded
25 Plaintiff had not been disabled since the application date through
26 the date of her decision and, thus, was ineligible for SSI benefits.
27 (Tr. 36-38.)
28

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff identifies the following errors: 1) at step two the ALJ failed to find diagnosed anti-social personality disorder and depression were not severe and erred in finding "possible Crohn's Disease"; (2) at step three, she failed to find Plaintiff was disabled under Listing 12.05(C); (3) she failed to properly reject the opinions of medical providers; and (4) she improperly assessed Plaintiff's RFC. (ECF No. 13 at 15-16, 12-13, 17-18.)

DISCUSSION

A. Step Two: Severe Mental Impairments and Crohn's Disease

13 Plaintiff argues the ALJ erred at step two when she "did not
14 find that Plaintiff has a condition under listing 12.08." (ECF No.
15 13 at 15, *citing* Tr. 30.) However, this is a misstatement of the
16 ALJ's step three finding that Listing 12.08 "is not met." (Tr. 30.)
17 As discussed below in detail, a Listing is met at step three when
18 medical evidence establishes the criteria listing in the Regulation.
19 Once a Listing and the duration² requirement are met, disability is
20 established and the sequential evaluation ends. *Sullivan v. Zebley*,
21 493 U.S. 521, 525 (1990). Here, at step two, the ALJ properly
22 considered psychological diagnoses by acceptable medical sources and
23 found Plaintiff's anti-social personality disorder was non-severe.
24 (Tr. 28.)

26 ² For an impairment to be disabling, it must be expected to
27 result in death or have persisted for a continuous period of 12
28 months. 20 C.F.R. § 416.909.

1 The fact that a medically determinable condition exists does
2 not automatically mean the symptoms are "severe," or "disabling," as
3 defined by the Social Security regulations. *See, e.g., Edlund*, 253
4 F.3d at 1159-60; *Fair v. Bowen*, 885 F.2d 597, 603 (9th cir. 1989);
5 *Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985). To establish
6 severity, the evidence must show the diagnosed condition
7 significantly limits a claimant's physical or mental ability to do
8 basic work activities. 20 C.F.R. § 416.920(c).

9 Here, the ALJ identified anti-social personality disorder,
10 depression, and substance abuse in partial remission as non-severe
11 medically determinable impairments because the record indicates
12 these impairments imposed no more than minimal limitation on
13 Plaintiff's ability to perform work-related activities. (Tr. 28.)
14 As properly found by the ALJ, neither Plaintiff's testimony nor the
15 medical evidence indicates significant work-related limitations due
16 to mental impairments. (Tr. 28.) For example, the record supports
17 the ALJ's finding that there is no evidence to indicate Plaintiff
18 sought treatment or further diagnosis for anti-social personality
19 disorder during the claimed disability period (*Id.*). Even assuming
20 the evidence did indicate the diagnosed personality disorder was
21 severe, as defined by the Regulations, failure to identify it as
22 such at step two is harmless because the ALJ considered mental
23 impairments in steps three through five and specifically addressed
24 anti-social disorder symptoms by limiting Plaintiff to superficial
25 contact with the general public and coworkers at step four. (Tr.
26 32.) *Shineski v. Sanders*, 556 U.S. 396, 409-10 (2009) (burden of
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28

1 showing harm from error in administrative proceedings falls on
 2 plaintiff); *see also Stout v. Commissioner, Social Sec. Admin.*, 454
 3 F.3d 1050, 1056 (9th Cir. 2006) (error harmless where no prejudice
 4 shown); *Johnson v. Shalala*, 60 F.3d 1428, 1436 n. 9 (9th Cir. 1995)
 5 (error is harmless if correction would not alter result).

6 Likewise, the ALJ's finding that Plaintiff's depression was
 7 considered mild in April 2008, is supported by the record.
 8 Plaintiff points to no evidence after that time to indicate he was
 9 diagnosed with or sought treatment for depression after that time.
 10 (Tr. 28.) As Plaintiff concedes, the only depression diagnosis
 11 prior to 2008 was when Plaintiff was a child. (ECF No. 13 at 16.)
 12 Plaintiff makes no showing that this diagnosis would be relevant to
 13 this claim. He also indicates he was treated for depression as an
 14 adolescent after his mother died while he was incarcerated. (Tr.
 15 255-56.) The record shows that in 2000, mental health therapist,
 16 Betty McQuirk, acknowledged the situational aspect of Plaintiff's
 17 depression and indicated she expected him to improve with counseling
 18 and medication.³ (*Id.*) Plaintiff points to no evidence that this
 19 situational depression met the duration requirement for severity or
 20 caused more than minimal limitations during the relevant period. 20
 21 C.F.R. §§ 416.920(a)(4)(ii), 416.909).

22 Regarding Crohn's disease, at step two the ALJ found the
 23 evidence establishes "possible" Crohn's disease as a severe
 24 impairment. (Tr. 27.) The ALJ's qualification of "possible" is

25
 26 ³ As a mental health therapist, Ms. McQuirk is not qualified
 27 to establish a diagnosis of depression. 20 C.F.R. § 416.913(d).
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1 consistent with varying diagnoses reflected in medical records from
2 emergency rooms and Plaintiff's treating physician. (Tr. 28, 556,
3 757.) As noted by the ALJ, Plaintiff testified he has had "stomach
4 problems" his entire life and underwent surgery for the condition.
5 (Tr. 32, 58.) Careful review of medical records from treating
6 surgeon M. Shane McNevin, M.D., indicates surgery in March 2009 was
7 for "indeterminate colitis," a condition also referred to as
8 "Crohn's colitis" by Dr. McNevin in June 2009. (Tr. 757, 760.)
9 Plaintiff offers no explanation how the ALJ's characterization of
10 Plaintiff's colon problems at step two as "possible Crohn's disease"
11 is inconsistent with the entire medical record or prejudiced him in
12 these proceedings. The ALJ's step two description of Plaintiff's
13 colon impairment as "possible Crohn's disease" is reasonable and not
14 reversible error. Plaintiff's step two arguments are without merit.

15 **B. Step Three: Listing 12.05C.**

16 Plaintiff argues the ALJ erred in finding Listing 12.05C was
17 not met. He contends the Introductory Paragraph to the Listing was
18 not properly considered in step three findings and the record
19 establishes the Listing requirements. (ECF No. 13 at 12-13.)

20 The Commissioner has promulgated a "Listing of Impairments"
21 that are "so severe that they are irrebuttably presumed disabling,
22 without any specific finding as to the claimant's ability to perform
23 his past relevant work or any other jobs." *Lester v. Chater*, 81
24 F.3d 821, 828 (9th Cir. 1995). If a claimant's impairment does not
25 meet the criteria specified in the Listings, he or she is still
26 disabled if the impairment equals a listed impairment. 20 C.F.R. §
27 416.920(d). If a claimant has more than one impairment, the
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1 Commissioner must determine whether the combination of impairments
2 is medically equal to any listed impairment. 20 C.F.R. §
3 416.926(a). Under Listing 12.05C, disability is established if the
4 following criteria is met:

5 *Mental Retardation:* Mental retardation refers to
6 significantly subaverage general intellectual functioning
7 with deficits in adaptive functioning initially manifested
8 during the developmental period; i.e., the evidence
demonstrates or supports onset of the impairment before
age 22.

9 The required level of severity for this disorder is met
when the requirements in A, B, C, or D are satisfied.

10 . . .

11 C. A valid verbal, performance, or full scale IQ of 60
12 through 70 and a physical or other mental impairment
imposing an additional and significant work-related
limitation of function.

13 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05C.

14 The ALJ did not err in finding Plaintiff did not meet or
15 medically equal this criteria. She discussed in detail the
16 requirements of each Listing and referenced specific evidence in the
17 record to support her step three determination. She concluded
18 Listing 12.05 is not met because the level of severity was not
19 established by the evidence. (Tr. 29.)

20 Although Plaintiff, without citing to the record, contends
21 evidence establishes a verbal and full scale IQ of 69 prior to the
22 age of 22, (ECF NO. 13 at 13), *de novo* review of the record shows
23 this argument is without merit. The record shows Plaintiff was
24 tested by Spokane Public Schools in 1986 by an evaluator identified
25 as Stephen Shafer, School Psychologist.⁴ (Tr. 358.) Mr. Shafer

26
27 ⁴ Under the Regulations, a licensed or certified school
28 psychologist is an acceptable medical source. 20 C.F.R. § 416.913

1 reported test scores of Verbal IQ (V/IQ) 69, Performance IQ (P/IQ)
2 72 and Full Scale IQ (FS/IQ) 69. (Tr. 35, 358-59.) The ALJ gave
3 specific and legitimate reasons for rejecting the 69 IQ scores. She
4 found the low IQ scores were not supported by Plaintiff's testimony
5 that he was in the process of obtaining his GED by taking adult
6 education classes. (Tr. 35, 63-64.) She also found the low IQ
7 scores are not supported by other medical evidence in the record.
8 (Tr. 34-35.) This reason is supported by IQ scores reported in 1981
9 by the school district and referenced by Mr. Shafer in his 1986
10 report. The 1981 IQ testing indicated Plaintiff scored a V/IQ of
11 74, P/IQ of 78, and FS/IQ of 74. (Tr. 200, 355, 359, 480.)
12 Significantly, Mr. Shafer reported:

13 The reviewer [Mr. Shafer] is quick to note that the [1986]
14 verbal, performance, and full scale scores are lower than
15 they were in 1981. Two contributing factors may be
16 present. 1) A Full Battery was not given on either the
17 Verbal or the Performance sub-tests. Since those scores
had to be pro-rated, the overall impact on the outcome can
only be guessed at this time. It should be noted too that
while there is a difference in the scores, the actual
numbers are not statistically significant.

18 (Tr. 359.) Mr. Shafer's statement fully explains the inconsistency
19 between the 69 IQ score and the rest of the intelligence test
20

21 (a) (1). Mr. Shafer's report gives no indication that he is either
22 licensed or certified; therefore, the ALJ reasonably found the
23 evidence did not establish Mr. Shafer was an acceptable medical
24 source. Even assuming Mr. Shafer is certified to establish
25 intellectual functioning, the ALJ gave other valid reasons for
26 discounting his test scores. Therefore, any erroneous conclusion
27 regarding Mr. Shafer's qualifications is harmless. *Carmickle*, 533
28 F.3d 1155, 1164 (9th Cir. 2008).

1 results. His explanation is not contradicted by other IQ test
 2 results or mental health examinations in the record. For example,
 3 in October 2000, mental health professionals and examining
 4 psychiatrist Verne Cressy, M.D., at Eastern State Hospital concluded
 5 Plaintiff did not have mental defects or disease and was capable of
 6 assisting in his criminal defense. (Tr. 194, 200.) In 2008,
 7 examining psychologist Dr. Rosekrans reported a full scale IQ test
 8 score of 72, and opined Plaintiff does not exhibit impairments in
 9 adaptive functioning that would support a diagnosis of mental
 10 retardation. (Tr. 480-81.) Supporting documentation indicates a
 11 verbal IQ of 71 and a performance IQ of 77. (Tr. 482.) This
 12 evidence supports the weight given by the ALJ to the 1986 report
 13 scores. See *Warre v. Commissioner of Social Sec. Admin.*, 439 F.3d
 14 1001, n.3 (9th Cir. 2006).

15 Plaintiff neither identifies significant limitations supported
 16 by the record that were not considered by the ALJ, nor does he
 17 present a theory as to how his non-severe mental impairments equal
 18 a disability under a Listing; therefore, he has not met his burden
 19 at step three. *Johnson v. Barnhart*, 390 F.3d 1067, 1070 (8th Cir.
 20 2004). Plaintiff did not meet the burden of proof to establish the
 21 Listing 12.05(C) medical criteria, and the ALJ's step three findings
 22 are supported by substantial evidence in the entire record.
 23 *Sullivan*, 493 U.S. at 530-33 (burden is on the claimant to show that
 24 his impairment meets all of the specified medical criteria for a
 25 Listing, or present medical findings equal in severity to all the
 26 criteria for the one most similar listed impairment).

27 **C. RFC Determination**

28 Plaintiff offers the conclusory argument that the ALJ's RFC

determination is not supported by the record because medical opinions were not properly evaluated. (ECF No. 13 at 17-18.) Plaintiff asserts the ALJ "improperly rejected" opinions from a clinic nurse practitioner and Drs. McNevin, Goff, Kester, and Rosekrans. However, he fails to explain what opinions were rejected or how alleged errors prejudiced him. (*Id.* at 18.) Therefore, his argument is unpersuasive. *Shineski*, 556 U.S. at 409-10. However, a claimant's RFC is not a "medical issue" under the Regulations; it is an administrative finding based on all relevant evidence in the record, not just medical evidence. *SSR 96-5p (Medical Source Opinions on Issues Reserved to the Commissioner)*; see also *SSR 96-8p (Assessing Residual Functional Capacity)*. The final determination of a claimant's ability to perform work is the province of the ALJ, and no special significance is to be given to a medical source opinion on issues reserved to the Commissioner. 20 C.F.R. § 416.927(e); *SSR 96-5p*.

Review of the record shows the ALJ adequately explained the little weight given nurse practitioner Jose Pares-Avila's opinion that Plaintiff was capable of only sedentary work. (Tr. 36.) The ALJ properly found the provider had never examined Plaintiff and his conclusion regarding Plaintiff's limitations was not consistent with the opinions of Plaintiff's treating physician. (*Id.*) This is a specific and "germane" reason for rejecting a non-examining opinion from a medical nurse practitioner. 20 C.F.R. § 416.913(d); *Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001); *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996); *SSR 06-03p*.

The record also shows that Dr. McNevin, Plaintiff's treating surgeon, noted Plaintiff's Crohn's disease "appears under good

control," and opined the disease would not limit him in his activities. He specifically recommended against certifying Plaintiff as disabled. (Tr. 760.) Plaintiff does not explain how this treating opinion conflicts with or should be given less weight than the opinions of Dr. Goff regarding treatment and limitations caused by Plaintiff's digestive disease.

In addition to giving significant weight to Dr. McNevin's treating physician opinions, the ALJ gave weight to Dr. Rosekrans' examining psychologist opinion that Plaintiff's IQ and memory deficits would not preclude employment, but they would affect his ability to learn job skills. (Tr. 34.) Dr. Rosekrans opined Plaintiff's prison history would be an impediment to finding work, but he opined unequivocally that Plaintiff was not mentally retarded. (Tr. 481.) These opinions are consistent with the non-examining opinion of Eugene Kester, M.D., who opined Plaintiff was not disabled due to mental impairments. (Tr. 34, 476-93, 481.) Plaintiff offers no cogent explanation how these medical opinions were improperly evaluated.

Considering the medical record in its entirety, as well as Plaintiff's credible testimony, the ALJ appropriately found Plaintiff could work at a light exertional level. (See, e.g., Tr. 61-64, 480.)⁵ Non-exertional limitations to accommodate Plaintiff's

⁵ Plaintiff reported to Dr. Rosekrans that he was able to care for himself, had no problems with activities of daily living, and left his former job for reasons not related to his physical or mental impairments. (Tr. 34, 480.) He also testified that he was not taking pain medication and his medical condition seemed to be

1 low IQ, limited fund of knowledge, and difficulties in social
2 functioning identified by Dr. Rosekrans (based on objective test
3 results) are also properly incorporated in the RFC determination.
4 (Tr. 32, 481.) Because the ALJ's reasoning is a rational
5 interpretation of the record in its entirety and supported by
6 substantial evidence, her RFC determination is affirmed.

7 **CONCLUSION**

8 The ALJ's decision is based on substantial evidence and free of
9 legal error. Accordingly,

10 **IT IS ORDERED:**

11 1. Plaintiff's Motion for Summary Judgment (**ECF No. 12**) is

12 **DENIED;**

13 2. Defendant's Motion for Summary Judgment (**ECF No. 17**) is

14 **GRANTED;**

15 The District Court Executive is directed to file this Order and
16 provide a copy to counsel for Plaintiff and Defendant. The file
17 shall be closed and judgment entered for Defendant.

18 DATED May 7, 2012.

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S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE

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28 improving. (Tr. 61-64.)